

No. 15892

**In the United States Court of Appeals
for the Ninth Circuit**

M. H. SHERMAN COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

*Appeal from the United States District Court
for the District of Arizona*

BRIEF FOR M. H. SHERMAN COMPANY, APPELLANT

**GUST, ROSENFELD, DIVELBESS
& ROBINETTE**

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BRIEF FOR THE APPELLANT

JURISDICTION

The Amended Complaint alleges that the Government having leased certain property from the plaintiff erected buildings thereon, including concrete floors, foundations, slabs, swimming pool, tennis court and other concrete structures. That at the termination of the lease when the government removed the buildings, it failed to remove the concrete structures and that plaintiff was damaged thereby to the extent of the cost of removal.

The jurisdiction of the District Court was invoked under Title 28 U.S.C., Section 1346b (R 9).

Judgment in favor of the defendant was entered and filed December 31, 1957 (R 26); Notice of Appeal and Bond on Appeal were filed January 6, 1958 (R 26). The jurisdiction of this court rests on Title 28 U.S.C., Sec. 1291.

NOTE: Figures appearing after the letter R refer to pages of the Transcript of Record.

STATEMENT OF THE CASE

The facts in this case are undisputed and have been stipulated to (Plaintiff's Exhibit 1). The allegations of paragraphs 1, 3 and 4 of the Amended Complaint are admitted (R 31) and by the stipulation, plaintiff's Exhibit 1, it is stipulated that the plaintiff, a California corporation, was duly qualified to do business in the State of Arizona and at all the times involved was the owner of the land leased to the Government and described in the certified copy of the Complaint (R 9). That the lease remained in force until October 27, 1952, when it was terminated as the result of Presidential Proclamation of April 28, 1952 (paragraph 4 of Complaint) (R 10).

The defendant entered into possession of the premises and erected structures and buildings thereon including concrete platforms, floors, footings, a swimming pool and tennis court. That at the termination of the lease when defendant removed the buildings, the concrete part of the structures mentioned were not removed (Plaintiff's Exhibit 1). (R 31)

It was also stipulated that the diminution in the value of the premises by reason of the presence of the concrete structures would be the cost of removal which is agreed would be \$17,500.00 (Plaintiff's Exhibit 1) (R 32).

On December 31, 1957, the court made its Findings of Fact in which it found the facts as above stated (R 22-24).

As conclusions of law the court found that:

1. The court has jurisdiction of the subject matter and the parties.
2. The lease specifically relieves the defendant from any duty to remove buildings or structures (R 24).

On December 31, 1957, Judgment was entered in favor of the defendant and against the plaintiff. Thereafter timely notice of appeal was given and bond filed (R 26-27).

ISSUES INVOLVED

The main issue involved is whether or not the government when it removed the buildings from the premises at the termination of the lease owed a duty to the plaintiff to remove the concrete floors, platforms, and other concrete structures, and whether or not the Government would be liable to the plaintiffs for the damages to the premises as a result of the concrete structures being left on the property.

SPECIFICATIONS OF ERROR

1. The court erred in its conclusion of law that the lease specifically relieved the defendant of any duty to remove buildings or structures from the leased premises. This conclusion of law is erroneous for the reason that it is not a correct construction or interpretation of the provisions of the lease and for the further reason that independent of the terms of the lease the Government owed a duty to the plaintiff to use the property so as not to damage the property or injure the inheritance and for the further reason that the conclusion of law is not justified by the evidence

or by the Findings of Fact and fails to take into consideration that part of the structures were removed by the Government.

2. The court erred in entering Judgment in favor of defendant and against plaintiff for all of the reasons set forth in Specification No. 1.

ARGUMENT

The Government is relying on paragraph 12 of the lease to relieve it from liability in this case. Paragraph 12 reads as follows:

“12. A joint survey and inspection of the conditions of the within-described premises has been made and reveals the property to be unimproved desert land, on which there are no physical improvements, and the lessor agrees to the foregoing statement and hereby relieves the Government of any and all restoration responsibility resulting from the use of the subject lands by the Armed Forces.” (R 38)

In construing this paragraph it is necessary to take into consideration other provisions of the lease. This was a lease of approximately one hundred seventy-five (175) acres at a nominal annual rental of \$85.00 for the following purposes: “requirements of the war department.” (R 35) The lease was on a regular Government printed form and contained the following provisions in paragraph 8:

“8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures or signs, in or upon the premises hereby leased (provided such alterations, additions, structures, or signs shall not be detrimental to or inconsistent with the rights

granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions, or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, * * * ." (R 36-37)

At the termination of the lease the Government under the provisions of paragraph 8 removed buildings from the premises but failed to remove the concrete floors, abutments, and other concrete structures. This we submit constituted a tortious act on the part of the Government and a violation of a duty it owed the plaintiff arising out of the contract and irrespective of the terms of the lease. That the damages to the plaintiff as a result of this failure on the part of the Government was in the sum of \$17,500.00.

It is claimed by the Government that paragraph 12 of the lease relieves the Government of the duty of removing the concrete. The fact that there was a contract between the parties does not necessarily mean that an action in tort cannot be brought for damages suffered by plaintiff by reason of the acts of the defendant. Agreements exempting persons from liability for negligence induce a want of care and for that reason no one should be permitted to contract against his own negligence.

12 Am. Jur. 683-684, paragraph 183.

This same authority says, however, that while the foregoing rule has been relaxed it still applies where the parties do not stand on equal footing or equality.

In the present case we have the government on one side and a private corporation on the other side en-

tering into a contract vitally affecting the defense activities of the government in time of a national emergency. It would seem under those circumstances that as a matter of justice and equity, any provision of the lease relieving the government from responsibility for damage to the property would be required to be set out in definite unmistakable and understandable terms. We respectfully submit that a provision relieving the government from restoration responsibility, of desert land, resulting from the use of such land by the Armed Forces is not sufficiently clear and unambiguous to constitute permission to destroy the use of the land for all practical purposes.

The crucial question in this case is whether, independent of the express provisions of the contract, which are relied upon by the defendant, the Government owed a duty to use its best efforts to use the leased property so as not to damage the property or injure the inheritance.

HARPER vs. INTERSTATE BREWERY COMPANY, 120 P. 2d 757. We quote from the opinion in that case:

“Thus it may be necessary for a plaintiff to show a contract between himself and the defendant in order to establish that the defendant has assumed a position, relationship or status upon which the general law predicates a duty independent of the terms of the contract but it does not necessarily follow that his only remedy is ex contractu. If from the position, contractually assumed, a duty be raised independent of the contract an action in tort may lie. * * * A mere breach of contract cannot be sued on a tort, but for tortious acts, independent of the contract, a man may be sued in tort, *though one of the consequences is a breach of his contract.*” (Emphasis supplied)

We will not quote further from the above authority but we respectfully call the court's attention to page 762 of the opinion where the court discusses the distinction between a tort and a breach of contract. The opinion contains many quotations from leading authorities. All are to the effect that causes of action need not be completely disconnected from contracts in order to constitute torts.

In all leases the covenant to deliver up the premises at the expiration of the lease in as good condition as when taken over by the tenant, reasonable wear and tear excepted, is the implied duty resting on the tenant.

32 Am. Jur., page 690, Sec. 811.

Any exception to this implied obligation is a modification of the common law rule and should be construed in favor of the landlord. This principal of construction particularly applies in this case where it is apparent that the lease is on a prepared government form and obviously prepared by the Government.

12 Am. Jur. 795, paragraph 252.

Another rule of construction applicable to this case is that where terms of a contract would appear on their face to be inserted for the benefit of one of the parties they will be construed as having been inserted by him and therefor in case of ambiguity will be construed against him.

17 C. J. S. 755.

The premises in the present case were leased to the Government for \$85.00 per year, a nominal rent, in-

dicating that the real consideration was a desire to aid the Government in its war efforts. We mentioned this for the purpose of showing why the contract and the corresponding rights and duties of the parties should be construed strictly against the Government.

Paragraph 12 is an exception to the usual obligation of a lessee and therefore its meaning should not be extended and its application should be strict and literal.

Paragraph 8 of the lease above quoted obviously applies to improved property when it provides that the Government may make alterations, attach fixtures, additions, and structures to the buildings. The paragraph also provides that such fixtures, alterations, etc. shall remain the property of the Government and may be removed. Having elected to remove the structures placed upon the premises by the defendant, it was the duty of the Government to remove the entire structure. There would be no salvage value in the concrete slabs and therefore the Government failed to remove them and without the buildings the concrete slabs were of no use to the premises and had no value. It was this act on the part of the Government of which plaintiff complains. The cement rendered the premises unfit for farming, subdivision purposes, or for any other purpose for which land of that nature might be used. On the contrary, they would have to be removed if the premises were to be used for any of the above purposes.

By the terms of paragraph 12 it was agreed that the premises were "unimproved desert land on which there are no physical improvements." (R 38) All this quoted clause of paragraph 12 means is that there were no improvements on the premises when the defendant

took possession and that therefore the only thing to be restored would be the desert growth. This we admit the Government was not required to do.

We respectfully submit that the provisions of paragraph 12 of the lease cannot be construed to relieve the Government from all responsibility for damage to the premises. For all practical purposes the land was destroyed and could not be used for any of the purposes that it might have been used for before it was taken over by the Government without the expenditure of \$17,500.00 for the removal of the concrete.

Before there can exist a right for destruction without an obligation to reconstruct, the language and intent must plainly and unmistakably so provide. We submit that paragraph 12 cannot be expanded to that extent.

The word "restore" relates to something having previously existed.

VOLUME 37A, Words And Phrases, page 70.

"Remove" means to "remove from a position occupied".

VOLUME 36, Words and Phrases, page 852.

Irrespective and independent of the terms of the lease there was an implied obligation on the part of the Government to treat the leased property in such manner that no injury be done to the inheritance.

U. S. vs. BOSTWICK, 94 U. S. 53, 24 Law Ed. 65
U. S. vs. JORDAN, 186 Fed. 2d 803

In the Jordan case the land had been leased to the Government for air to ground gunnery. The presence of steel jacketed machine gun bullets in the standing timber rendered the timber valueless. The land was acquired by the Government for temporary use partly through leases and partly through condemnation actions. In the condemnation suit the government secured from the land owner an agreement stipulating to the fair rental value of the property and land owner agreed to accept said sum in full and complete satisfaction for the land and release the United States from any and all claims for damages and in the leases taken from the land owners the United States was released from all claims excepting unpaid rent. The trial judge set aside the judgment entered on the stipulation on the ground that they were manifestly unconscionable and ruled that the claimants were entitled, in addition to the rental value, to recover just compensation for the taking of their growing timber. The Circuit Court held that even in the absence of an express covenant as was the situation in the condemnation suits, there is an implied obligation on the part of the lessee to treat the property leased in such manner that no injury be done to the inheritance.

It is our position that paragraph 12 of the lease does not cover and was not intended to cover damages caused by the negligence or tortious acts of the Government.

UNITED STATES vs. KELLY, 236 Fed. 2d 233

This case arose in South Dakota where the plaintiff Kelly purchased garbage from the Veterans' Hospital at Hot Springs. The contract contained a provision that the property was offered "as is" and without recourse against the government as follows:

“The government makes no guaranty, warranty, or representation, expressed or implied, as to the quantity, kind, character, quality, weight, size or description of any of the property or its fitness for any purpose and no claim shall be considered for allowance or adjustment or for rescission of the sale based upon the failure of the property to correspond to the standard expected; this is not a sale by sample.”

Several of the plaintiff's cattle had access to this garbage which had been contaminated by the employees at the hospital and the court found that the garbage contained lead and was poisonous and caused the deaths of plaintiff's cattle. The Government relied for defense on the provision of the contract, part of which is quoted above. We quote from the opinion of the circuit court in reference to the above paragraph:

“The trial court declared in its opinion that the paragraph does not cover and was not intended to cover liability for negligence of the defendant and we are in accord with that declaration * * * * .”

The reasoning in the Kelly case is applicable to the present case.

CONCLUSION

We have here the situation of the plaintiff turning over to the government approximately one hundred seventy-five acres of land for the use of the War Department. This land was unimproved desert land and it would obviously be necessary, before the land could be used for the purposes for which the Government required it, to remove the desert growth and necessarily change the contour of the land to some extent. To do this would require excavating and filling before buildings could be erected. To return the land in its orig-

inal condition at the expiration of the lease would be difficult if not an impossible task. It was to avoid this situation that the provisions of paragraph 12 were adopted.

It is admitted that by leaving the concrete structures on the premises damages in the amount of \$17,500.00 has resulted. This, it seems to us, is a severe penalty to impose upon the plaintiff for its cooperation with the Government in time of an emergency. When the buildings were removed by the Government, the concrete footings and floors remaining were valueless and their usefulness was destroyed.

We respectfully submit that in all fairness and as a matter of law this case should be remanded with directions to enter judgment in the sum of \$17,500.00 in favor of plaintiff.

Respectfully submitted,

GUST, ROSENFELD, DIVELBESS
& ROBINETTE

By FRANK E. FLYNN

Attorneys for Appellant

A P P E N D I X

Plaintiff's Exhibit 1 appears in the Transcript of Record at pages 31 through 50, inclusive.

Identified, Marked, and Received in Evidence
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